

## Chapter CXCIV.<sup>1</sup>

### FUNCTION OF THE SENATE IN IMPEACHMENT.

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#### 1. Does the Senate sit as a court? Section 471.

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**471. During the Archbald trial the functions of the Senate sitting for an impeachment trial were discussed by managers and counsel for respondent.**

On January 9, 1913<sup>2</sup> in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Alexander Simpson, of counsel for respondent, in final argument said:

The question is whether or not the duty which you have to perform is in point of fact a judicial duty. It must be conceded that it is not a legislative duty. That is perfectly clear. It is certainly equally clear that it is not an executive duty. I can not see what else remains unless it is a judicial duty.

But the Constitution in its various articles has made that exceedingly clear. In Article I, section 3, it says "the Senate shall have the sole power to try all impeachments." It says, "when the President of the United States is tried the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the Members present." It says, "judgment in cases of impeachment shall not extend further than to removal from office," and so on, "but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to the law." It says in Article II, section 2, "the President \* \* \* shall have power to grant reprieves and pardons for offenses against the United States except in cases of impeachment," and Article III, section 2, lastly says, "the trial of all crimes except in cases of impeachment shall be by jury, and such trial shall be held in the State where the said crime shall have been committed."

Now, I want to ask if it is possible to use words more clearly demonstrative than that which you as Senators are doing, you are doing in a judicial capacity? That is what I am claiming at this stage. It will reach up itself to its proper conclusion after a little while. The point is, you are in fact sitting as judges. I read, for it expresses briefly the thought, the language of Professor Dwight in 6 American Law Register (n. s.), 258-259:

"When a criminal act has been committed, it may evidently be regarded in three aspects: first, the injury to the individual or his family may be considered; second, the wrong to the executive officer charged with the administration of the laws may be looked at; and, third, the mind may dwell upon the general wrong done to the State, or 'the people,' as we say in modern times. This view was early taken in the common law; the injury to the individual was redressed by a proceeding called an appeal; the injury to the King by a process called an indictment; the wrong to the entire nation by a proceeding called an impeachment. In process of time the injury

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<sup>1</sup>Supplementary to Chapter LXV.

<sup>2</sup>Third session Sixty-second Congress, Record, p. 1271.

to the individual came to be regarded as a private and not as a public wrong, so that in the progress of the law there remained two great criminal proceedings—indictment and impeachment.”

If the position I have taken on this point be accurate, we ought to be able to take the next step, and a long one, in regard to this matter. If this is a court then it is perfectly evident that the rules which experience has demonstrated to be wise and applicable in trials in other courts ought to be applied here; and among those rules, which are down at the very foundation of Anglo-Saxon jurisprudence, are those which relate to the effect of character evidence, to the effect of the reasonable doubt doctrine, to the effect of the presumption of innocence, and to the effect to be given to admissions made during the trial.

Replying to this argument on the following day,<sup>1</sup> Mr. Manager Henry D. Clayton, of Alabama, said:

Mr. President, much has been attempted by counsel for the respondent in their effort to show that this is a court in the ordinary acceptance of that term. Whatever name you may call this body sitting here now, whatever functions they may discharge, it can not be said to be a court as that word is employed in the Constitution or understood by the ordinary man. It is more than a court. Under our Government it is clothed with the highest and most extraordinary powers of any body or any functionary or any agency of our Federal Government. Your powers here invoked are political in their nature. Mr. Bayard announced that doctrine in the first impeachment case, that of Blount. Every commentator, including Story and all the rest, has quoted it with approval, and should any man deny it he would at once confess himself ignorant of the history and the law of impeachments.

Mr. Manager Clayton quoted from Article III of the Constitution and continued:

So we form a correct conception of what this tribunal is, its purposes and its powers. Again, if it be necessary, let me ask from what power did this judge derive that trust which he has violated? Did he derive it from the judicial power? No. It was derived from the exercise of a political power. The President, exercising political power, nominated him for this office, and the Senate of the United States, with its power of disapproval, with its vitalizing power of confirmation, before he could become a public officer exercised not a legislative function, not a judicial function, but brought into operation a power which in its very nature and in any just conception you can take of it was a political power.

Now, Mr. President, I say this because I want to get away from the murky and unhealthful atmosphere of a police court, and I want to try on a higher plane this great cause, involving the rights—the civil rights—the power, and the majesty of the American people on the one side and on the other the puny privilege of an unfaithful judge, to desecrate his official position. It is political. Why? Because under representative institutions that is the only way under our Constitution that the political power exercised in the creation of a Federal judge can be performed. Under the State constitutions, or most of them, that political power is exercised by the people in their primary capacity when they select by ballot their judges to preside over them and administer public justice.

Mr. Manager Clayton then read citations from the following authorities: The Works of Charles Sumner, Vol. XII, E. 415, 6th S., 93, p. 321; Samuel J. Tilden, Public Writings and Speeches, vol. 1, p. 474; Rawle, on the Constitution, p. 211.

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<sup>1</sup> Record, p. 1345.